Supreme Court, U.S.
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In The

Supreme Court of the United States

FRITZ KREISS
And
ALTERNATIVE UTILITY SERVICES
OF IL., INC., an Illinois corporation,

Petitioners,

vs.

NEIL SALSITZ, BIAGIO D'UGO,
And
NEW HORIZON PRODUCTIONS, LTD.,
an Illinois corporation,

Respondents.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court denied petitioners their Constitutional rights to due process and equal protection under the law by rehearing and reversing its decision based exclusively on a change in the majority of the Court's personnel?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Fritz Kreiss and Alternative Utility Services of IL, Inc., an Illinois corporation, (Kreiss), respectfully requests that a writ of certiorari be issued to review the Judgment of The Illinois Supreme Court entered on December 3, 2001 in the case of *Neil Salsitz, Biagio D'Ugo, and New Horizon Productions, Ltd., an Illinois corporation v. Fritz Kreiss and Alternative Utility Services of IL, Inc., an Illinois corporation,* Case No. 89156.

OPINIONS BELOW

Opinion of the Illinois Supreme Court of December 3, 2001 is reported at 198 Ill. 2d 1, 2001, WL 1530841 (2001) and is reproduced in the Appendix at App. 1.

The Opinion of the Illinois Supreme Court of September 20, 2001 is reported at 198 Ill. 2d 1, 761 N.E.2d 724, 260 Ill.Dec. 541 (2001) and is reproduced in the Appendix at App. 22.

The opinion of the Illinois Supreme Court of December 1, 2000 was previously reported at 2000 WL 1763323 (2000) but has not been published in print media and is reproduced in the Appendix at App. 41.

The opinion of the Illinois Appellate Court, First Appellate District of Illinois is reported at 311 Ill.App.3d 590, 724 N.E.2d 1019, 244 Ill.Dec. 131 (1999).

STATEMENT OF JURISDICTION

On December 1, 2000, the Supreme Court of Illinois entered judgment for petitioners. On January 29, 2001, the Illinois Supreme Court allowed rehearing and on September 20, 2001, reversed its earlier decision. A timely petition for rehearing of the subsequent decision was filed by petitioners. On December 3, 2001, the Illinois Supreme Court denied rehearing, but modified its judgment on said denial of rehearing. This Court has jurisdiction to review the judgment and denial of rehearing on writ of certiorari pursuant to 28 U.S.C. §1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 6, §3, Illinois Constitution:

> The Supreme Court shall consist of seven Judges. Three shall be selected from the First Judicial District and one from each of the other Judicial Districts. Four Judges constitute a quorum and the concurrence of four is necessary for a decision. Supreme Court Judges shall select a Chief Justice from their number to serve for a term of three years.

Ill. S.Ct. Rule 367:

> (a) Time; Length. A petition for rehearing may be filed within 21 days after the filing of the judgment, unless on motion the time is shortened or enlarged by the court or a judge thereof. Motions to extend the time for petitioning for rehearing are not favored and will be allowed only in the most extreme and compelling circumstances. Unless authorized by the court or a judge thereof, the petition shall not exceed 20 pages if printed or 27 pages if not printed.

(b) Contents. The petition shall state briefly the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the record and brief relied upon, and with authorities and argument, concisely stated in support of the points. Reargument of the case shall not be made in the petition.

* * *

(e) Limitation on Petitions in Appellate Court. When the Appellate Court has granted a petition for rehearing and entered judgment on rehearing no further petitions for rehearing shall be filed in that court.

STATEMENT OF THE CASE

The fundamental question in this case is whether the Constitutional rights to due process and equal protection under the law, U.S. Const. Amend. V, Amend. XIV, §1, are denied to litigants when a state court of last resort reverses itself on rehearing after a majority of its justices originally deciding the case have left the bench, particularly where departing justices constituted the entire voting majority of a split decision in the initial judgment?

Pursuant to Article 6 of the Illinois constitution, the Supreme Court of Illinois is comprised of seven Justices. A quorum of four justices is necessary for that court to act. The Illinois Supreme Court entered its first decision in this case on December 1, 2000. That decision was

entered by a margin of four to three in favor of petitioners [App. 41]. Shortly thereafter, all four justices comprising that majority left the bench by normal attrition and were replaced by four new justices. That change occurred during the period in which respondents filed for rehearing and before a decision regarding rehearing was reached.

On January 29, 2001, the Illinois Supreme Court, absent the four justices that signed the majority opinion, but including four new justices, allowed rehearing, scheduled the briefing thereof and further ordered that oral argument would be entertained [App. 40]. However, the Illinois Supreme Court subsequently declined oral argument and the case was called on that court's non-oral docket on May 22, 2001.

On September 20, 2001, the court, composed of a new majority, reversed its original decision [App. 22]. All four new justices participated in the rehearing and reconsideration. None of the four justices that participated in the initial decision participated in the rehearing, there being no provision for that under Illinois law. The second opinion directly adopts the previous dissenting opinions as the majority opinion of the newly constituted court. There is no statement on the face of the subsequent decision that identifies a misapprehension, misconstruction or error. There is nothing within the opinion that indicates any reason for rehearing or reversal.

Petitioners filed their petition for rehearing seeking relief from the Illinois Supreme Court based upon a violation of their Constitutional rights of due process and equal protection under the law, U.S. Const., Amend. V,

Amend. XIV, §1. Petitioners argued that the rehearing was predicated solely upon a change in the court's personnel. On December 3, 2001, the Illinois Supreme Court denied said petition for rehearing and modified its opinion to include an addendum responding to the denied petition for rehearing [App. 1].

Illinois does not permit response to a petition for rehearing unless the rehearing is allowed. Having allowed the rehearing, the Illinois Supreme Court directed petitioners to answer. Petitioners challenged the court's decision to accept rehearing based in part upon the change in the makeup of the bench that had occurred in the intervening period between the decision and the allowance of rehearing. The court reversed itself as noted and Plaintiffs challenged that reversal specifically arguing that such an action violated petitioners' rights of equal protection and due process as guaranteed by the United States Constitution.

This petition for writ of certiorari seeks an examination of the Illinois Supreme Court's procedures, which allow rehearing on a case where justices deciding the matter originally cannot participate in the decision to rehear the case. It further seeks examination of whether the participation of justices not qualified by virtue of their absence at the time the case was originally decided in the rehearing itself was a denial of petitioners' right of equal protection.

REASONS FOR GRANTING THE WRIT

I.

Examination of State and Federal Models for Rehearing Cases on Appeal

Although virtually every state jurisdiction has some form of limitation on rehearing by its reviewing courts, none address the inherently unfair procedure of rehearing a case by justices not involved in the original review of a case. Inherently unfair because such rehearings are not truly rehearings but hearings anew. Such circumstances fundamentally serve to undermine the legitimacy of any reviewing court. The scope of rehearing must therefore be limited, and the qualifications of justices to participate in a rehearing must also be limited by basic principles of due process and equal protection.

Federal jurisdictions restrict the rehearing of cases to judges or justices qualified to sit in rehearing. This Court, for instance, requires that rehearing can only be granted by a majority of the Court and only "at the instance of a Justice who concurred in the judgment or decision." Sup. Ct. R. 44. This assures that attempts to obtain rehearing after the majority has left the bench cannot succeed.

At the Federal appellate level, rehearings *en banc* under FED. R. APP. P. 35, have served to develop doctrinal consistency within a circuit. Further, the presence of senior judges from the district from which the panel decision originated, that participated in the initial panel decision, help to maintain consistency within the subject litigation as well.

While few states have such specific arrangements, the states have created systems for rehearings that fall into three distinct forms. First, the vast majority of states restrict rehearing to the correction of obvious error, or misunderstanding of facts or the law by the reviewing court. Secondly, several states restrict rehearings in unique and explicit ways. North Carolina and Michigan provide two interesting examples. North Carolina requires a certificate from two members of that state's bar, that have no interest in the case and have not been counsel in the action certifying that they consider the decision of the reviewing court to be "in error on points specifically and concisely identified." N.C. R. App. P. Rule 31(a). In adoption cases, Michigan, requires that the reviewing court may only rehear a case for good cause and "[the] reasons for its decision must be in writing or stated on the record." MI. R. PROB. MCR 5.756. Lastly, there are a small group of states that do not maintain any statutory provision restricting rehearing.

Illinois falls within the majority. It limits rehearings to a review of "points claimed to have been overlooked or misapprehended by the court with proper reference to the particular portion of the record and brief relied upon, and with authorities and argument, concisely stated in support of the points." Ill. S.Ct. Rule 367(b).

However, there is no restriction on whether a justice of the Illinois Supreme Court may rehear a matter in which he or she did not initially participate. Even though a justice of the Illinois Supreme Court was not a member of the court at the time a matter was first ruled upon, under the current procedures, he or she may participate in the rehearing. Furthermore, there is no limitation on

the number of times parties may petition the Illinois Supreme Court for rehearing. Ill. S.Ct. Rule 367(e).[1]

In this case, the petitioners were denied the equal protection of having their case reheard only by justices that heard the case originally. The system for rehearing cases by the Illinois Supreme Court is fatally flawed; it cannot deliver due process without providing for changes in justices during the rehearing period. Due process was therefore not enjoyed by the petitioners.

Petitioners did not receive the protections they would have enjoyed had the petition for rehearing been considered by the same justices which heard and decided the case initially. Similarly, petitioners were denied equal protection under the law by being subjected to a rehearing by different justices than participated in the original hearing. This was significantly exacerbated by the fact that not merely one justice left the bench but a majority of the bench departed – a majority composed of the entire majority originally finding for petitioners.

II.

The Illinois Supreme Court and Rehearings

While the rehearing statute in Illinois (Ill. S.Ct. R., Rule 367) appears to provide for equal protection, its enforcement in the recent period has not. The case at bar is one of five cases decided at the end of that court's 2000

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[1] Under this system, a losing party in a close decision rendered near the end of a particular justice's term of office would do well to file several rehearings until a new, potentially more favorable justice is installed on the bench.

term which were taken for rehearing and reversed after the majority of the court departed that court's bench. *People v. Wiley*, ___ Ill. 2d ___, 2001 WL 1287840 (2001) superseding 2000 WL 1709924 (2000); *People v. Edwards*, ___ Ill. 2d ___, 757 N.E.2d 442 (2001) superseding ___ Ill. 2d ___, 2000 WL 1709910 (2000); *Travelers Ins. Co. v. Eljer Mfg., Inc.* (consolidated cases) 197 Ill. 2d 278, 757 N.E.2d 481, 258 Ill.Dec. 792 (2001), superseding ___ Ill. 2d ___, 2000 WL 1763322 (2000). This is a disturbing new trend considering that the Illinois high court did not take that many cases for rehearing in the past quarter century. *High Court Makes Rare Move; Illinois Justices Grant Rehearings on 5 Opinions, Chicago Tribune*; Oct 31, 2001; Parsons, Christi.

The Illinois Supreme Court is made up of seven justices. A quorum of four justices is necessary to take action in any matter. Ill. Const. Art. 6, §3. There is no limitation as to qualifications of a sitting justice to rehear a case.

However, the need for limitations on rehearings was recognized by the Illinois Supreme Court itself over a century ago when it held: "We are not disposed to decide cases by piecemeal, and we therefore can entertain petitions for rehearings only for the purpose of correcting errors into which the court may have inadvertently fallen in deciding the case as originally presented." *Gaines v. Williams*, 146 Ill. 450, 459, 34 N.E. 934, 937 (1893). The court further strengthened its position when it held that "rehearing is only granted for the purpose of correcting errors into which the court may have inadvertently fallen in deciding the case as originally presented. . . . " *Matthews v. Granger*, 196 Ill. 164 at 170, 63 N.E. 658 at 661 (1902).

Yet there is no case or statutory provision in Illinois regarding the propriety of a justice participating in a rehearing that did not participate in the initial disposition of a case. Perhaps that is because such a scenario is so far beyond the bounds of acceptable due process and equal protection that it did not require direct address. Unfortunately, that event has occurred. Great violence is done to public confidence in the courts when a court elects to reverse its position merely upon the change in the personnel of its bench. Engaging in such an activity is such a clear violation of basic principles of due process and equal protection that it led at least one prominent Illinois jurist on its high court to proclaim:

> If the law were to change with each change in the makeup of the court, then the concept that ours is a government of law and not of men would be nothing more than a pious cliche. *People v. Lewis*, 88 Ill. 2d 129, 167, 58 Ill.Dec. 895, 430 N.E.2d 1346 (1981) (Ryan, J., concurring).

Most recently, the very justice who authored the subsequent opinions upon which this writ is sought, recognized the fundamental impropriety of predicating a change in the court's position on a change in its personnel. Justice Freeman stated in *People v. Mitchell*, 189 Ill. 2d 312, 727 N.E.2d 254 (2000) "the circumstances that warrant changes in the law do not include changes in personnel of the court." 189 Ill. 2d 312, 366, 727 N.E.2d 254, 284. Ironically, the *Mitchell* case was decided in the latter portion of the term in which the four justices made their noted departure. That irony is heightened by examination of these further statements presciently authored by Justice Freeman himself:

> At the end of this current year, the makeup of this court will undergo some change because four justices by virtue of election or retention may not return. While I am not clairvoyant, I do know that when the court reconvenes in January 2001, the current makeup of the court will have changed. It is my sincere hope that this case will not serve as a model for future courts to follow.
>
> * * *
>
> [Such a result would send] the unfortunate message to the bench, the bar, and the public that "this court does not decide issues based on the law, but based instead on who happens to be sitting on the court at a particular time."
>
> * * *
>
> One must now wonder how many other of our previous decisions, decided by 4-3 margins, will be similarly overruled on the basis of a change in court personnel. 189 Ill. 2d 312, 398, 727 N.E.2d 254, 301.
>
> * * *
>
> [Such an] imprudent action invites nothing but open defiance of our precedent and seriously undermines this court's legitimacy. 189 Ill. 2d 312, 399, 727 N.E.2d 254, 301.

The rehearing engaged in by the Illinois Supreme Court in the subject case did not remedy any error or misapprehension and did not address any points overlooked in its original decision. Every element of the subsequent opinion issued on September 20, 2001 was

present in dissents to the court's first decision. This demonstrates that each element was discussed and appreciated, but nevertheless rejected by that court's majority in its first opinion.

The opinion rendered on September 20, 2001 gives no reason for the rehearing and identifies no misapprehension or error present in the first opinion. The addendum states that the matter was reheard based upon respondents' argument that the Illinois Supreme Court had misconstrued its rule regarding interlocutory appeals, and that the language of the subject rule was permissive rather than mandatory. Yet the dissenting opinion of Chief Justice Harrison was devoted solely to that topic. Thus, it is clear that the Illinois Supreme Court did not elect to rehear this case to correct any error or misapprehension, but merely to permit the participation of new justice to change the outcome of the matter.

In reversing itself, after the exit of the entire majority, that court violated petitioners' rights to due process and equal protection under the law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. It permitted the respondents a second bite at the apple. It resulted in a new hearing by a fundamentally reconstituted court, thus rendering the Illinois Supreme Court a court of men and not of laws.

This petition for writ of certiorari offers a unique opportunity for this Court to examine the conduct of the highest state courts in delivering that most precious element of equal protection and due process: consistency.

CONCLUSION

Petitioners respectfully request that this Court grant this petition for writ of certiorari to vacate the opinions of the Illinois Supreme Court entered on December 3, 2001 and September 20, 2001, to reverse the grant of rehearing entered by the Illinois Supreme Court on January 29, 2001, and to reinstate the opinion of the Illinois Supreme Court entered on December 1, 2000.

Respectfully submitted,

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SUPREME COURT OF ILLINOIS

Docket No. 89156 – Agenda 18 – May 2000
NEIL SALSITZ *et al.*, Appellants, v. FRITZ KREISS *et al.*, Appellees.

Opinion Modified On Denial Of Rehearing – 12/3/01
Original Opinion filed – 9/20/01

Justice FREEMAN delivered the opinion of the court:

At issue in this case is the arbitrability of certain disputes between plaintiffs, Neil Salsitz, Biagio D'Ugo, and New Horizon Productions, Ltd., and defendants, Fritz Kreiss and Alternative Utility Services of IL, Inc.

BACKGROUND

On March 9, 1994, Neil Salsitz and Biagio D'Ugo executed letters of understanding, dated November 17, 1993, whereby each agreed to invest $6,500 in Alternative Utility Services of IL, Inc. (AUS). Fritz Kreiss executed the letters of understanding as president of AUS. The letters of understanding do not contain an arbitration clause. Also on March 9, 1994, Salsitz and D'Ugo each executed a document denominated:

> "Addendum 1, Letter of Understanding dated November 17, 1993
>
> INCENTIVE STOCK OPTION PROGRAM."

These documents contained an arbitration clause providing in part:

> "In the event there are any claims or disputes between PARTIES hereto, such claims or disputes shall be submitted by the PARTIES for resolution and binding arbitration within Lake

> County, IL, in accordance with the rules of the American Arbitration Association as in effect under IL law."

On June 17, 1994, Salsitz and D'Ugo requested the return of their investment and reimbursement of certain expenses they had incurred. On July 21, 1994, Kreiss returned Salsitz's and D'Ugo's original investment. However, Kreiss did not reimburse Salsitz's and D'Ugo's expenses. Salsitz and D'Ugo then filed suit in the municipal division of the circuit court (municipal court) for breach of contract and fraud, seeking $29,888.58 in unpaid expenses.

Kreiss and AUS moved to dismiss the municipal court action based upon the presence of the arbitration clauses in the stock option agreements. Salsitz and D'Ugo filed a response denying that they agreed to arbitrate the claims at issue, arguing that there was no agreement to arbitrate since the arbitration clauses were in the stock option agreements, not the letters of understanding. Salsitz and D'Ugo also argued that the contracts had been rescinded.

On February 15, 1995, the municipal court ordered the civil action stayed and directed that an arbitrator determine whether particular matters were arbitrable. Salsitz and D'Ugo did not pursue arbitration. However, Kreiss and AUS filed their own demand for arbitration on November 16, 1995. In their demand for arbitration, Kreiss and AUS sought an injunction preventing Salsitz, D'Ugo and New Horizon Productions, Ltd. (New Horizon), from unfairly competing with AUS, and sought monetary damages for violation of the Illinois Trade Secrets Act, for tortious interference with defendants'

existing contracts and with prospective business relations, for breach of contract, and for breach of fiduciary duty. On November 17, 1995, Salsitz and D'Ugo nonsuited the action in municipal court. At that point, all that remained before the court was Kreiss and AUS's demand for arbitration.

Several arbitration hearings were held in 1996 and 1997. On August 8, 1997, Salsitz, D'Ugo and New Horizon filed a verified complaint in chancery court for declaratory and injunctive relief, seeking to stay and permanently enjoin the arbitration proceedings on the grounds that no agreement to arbitrate existed. Plaintiffs also sought a declaration that the arbitration clauses did not apply to any dispute under the letters of understanding, and, in particular, to the claims in the arbitration proceedings. In addition, on August 13, 1997, plaintiffs filed a motion for a stay of arbitration, and, on August 15, 1997, plaintiffs filed a motion for a temporary restraining order to enjoin the continuation of the arbitration hearings. On August 19, 1997, the chancery court denied plaintiffs' motion for a temporary restraining order. As explained by the court at a later hearing:

> "This case first came to this Court during the pendency of an arbitration hearing. At that time, on or about August 19, 1997, then Counsel for Plaintiffs Salsitz, D'Ugo and the New Horizon Productions asked this Court to stay an arbitration proceeding commencing between the parties. The issue addressed during the emergency motion was a determination as to the arbitrability of the issues. Although this Court did not enter a stay of the arbitration Proceedings at

> that time, the Court did leave it open for parties to address the issue at a later date."

The arbitration continued. On September 23, 1997, plaintiffs filed an amended motion for a stay of arbitration, asserting that no agreement to arbitrate existed. On October 9, 1997, the chancery court denied plaintiffs' amended motion for a stay. Thereafter, the arbitrator notified the parties that the final arbitration hearings would be held on December 10, 1997. Plaintiffs did not appear for those hearings. The arbitrator heard evidence from defendants regarding damages that they sustained. On December 11, 1997, the arbitrator declared the hearings closed, and issued a notice to plaintiffs on December 24, 1997. The notice informed plaintiffs that the arbitrator would issue an award within 30 days. Plaintiffs did not file a motion to reopen the hearings. On January 10, 1998, the arbitrator awarded defendants $3,761,174.40 in actual damages, and $2.5 million in punitive damages.

On January 21, 1998, defendants filed an application for confirmation of the arbitration award and for entry of judgment on the award. Plaintiffs opposed confirmation of the arbitration award; asked that the chancery court review the arbitrator's determination of arbitrability; asked that the court vacate the arbitration award; and asked for leave to file an amended complaint, requesting that the court vacate the arbitration award. Subsequently, on June 12, 1998, Salsitz and New Horizon amended their complaint to add a count seeking to vacate the arbitration award. D'Ugo also amended his complaint to add a count seeking to vacate the arbitration award. In the amended verified complaints, plaintiffs alleged, *inter alia*, that the arbitration award was obtained through undue means,

citing misleading communications between the arbitrator and plaintiffs. Plaintiffs complained that the arbitrator should not have conducted the hearing on December 10, 1997, in plaintiffs' absence, and should not have closed the hearings without giving plaintiffs an opportunity to present evidence. Plaintiffs alleged that they did not know the law firm, which had represented plaintiffs at the earlier hearings, had decided to cease representing plaintiffs and, consequently, did not appear on plaintiffs' behalf at the hearing on December 10.

Thereafter, defendants filed a motion to dismiss plaintiffs' amended verified complaints. At a hearing on January 27, 1999, the chancery court noted that the issue of arbitrability and defendants' motion to dismiss plaintiffs' amended complaints were intertwined. The court stated that it would first "address whether or not there could be arbitration of the agreement or agreements involved in the business relationship that was entered into by the parties." The court believed, however, that it could not upset or invalidate the arbitrator's ruling as to the arbitrability of the issues because the arbitrator's ruling was entitled to deference. The court reasoned:

> "[T]he Court finds that it cannot upset or invalidate the arbitrator's rulings as to the arbitrability of the issues * * * . The Court and the parties are both aware that – this is in parenthesis. Now I am quoting a case 'Judicial review of arbitration award is restricted. Courts encourage settlement of disputes by arbitration; and accordingly, judicial review of an arbitration award is more limited than Appellate review of a Circuit Court's decision. Courts must construe an arbitration award whenever possible to

> uphold their validity. Limited judicial review fosters the long accepted and encouraged principles that arbitration awards should be the end and not the beginning of litigation.' "

The court dismissed plaintiffs' amended verified complaints, affirmed the arbitrator's award of actual damages, and vacated the award of punitive damages.

Within 30 days of this final ruling, plaintiffs appealed from the order dismissing their amended verified complaints. Defendants moved to dismiss the appeals as untimely under Supreme Court Rule 307(a)(1) (188 Ill. 2d R. 307(a)(1)). Defendants argued, *inter alia*, that plaintiffs should have filed an interlocutory appeal from the denial of plaintiffs' motion to stay the arbitration proceedings. Since plaintiffs failed to file an interlocutory appeal, they forfeited their right to contest the arbitrability of the letters of understanding. The appellate court granted the motion to dismiss as to the issue of arbitrability, but denied the motion as to the remaining issues. Having considered those issues on the merits, the appellate court affirmed the chancery court's order. 311 Ill. App. 3d 590. We allowed plaintiffs' petition for leave to appeal.

ANALYSIS

A. *Res Judicata*

Defendants maintain that, in its order of February 15, 1995, the municipal court determined the issue of arbitrability in defendants' favor. Salsitz and D'Ugo did not appeal that order. Defendants note that the amended verified complaints plaintiffs subsequently filed in chancery court sought to stay and permanently enjoin the

arbitration proceedings on the grounds that no agreement to arbitrate existed, and sought a declaration that the arbitration clauses were invalid or nonbinding. Defendants conclude the chancery court was correct in dismissing plaintiffs' amended verified complaints because the doctrine of *res judicata* barred relitigation of the issue of arbitrability. We disagree.

In *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435 (1988), this court explained when it is appropriate for the circuit court to determine the issue of arbitrability in the first instance:

> "Where the language of the arbitration agreement is clear, and it is apparent that the dispute sought to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue and compel arbitration. [Citations.] Similarly, if it is apparent that the issue sought to be arbitrated is not within the ambit of the arbitration clause, the court should decide the arbitrability issue in favor of the opposing party, because there is no agreement to arbitrate. [Citations.] 'Thus, the arbitrability issue emerges as essentially one of giving effect to the parties' expressed intention about the use of arbitration.' [Citation.] The paramount factor in determining the parties' intention is the scope of the arbitration clause in the contract." *Donaldson*, 124 Ill. 2d at 445.

This court noted, however, that a problem arises when the parties broadly agree to arbitrate and it is still unclear whether the subject matter of the dispute falls within the scope of the arbitration agreement. When the issue of contractual intention is reasonably debatable, should the

determination of arbitrability be made by the court or by the arbitrator in the first instance? Having examined cases from other jurisdictions and reviewed the intent of the drafters of the Uniform Arbitration Act (see 710 ILCS 5/1 *et seq.* (West 1996)), this court held that:

> "when the language of an arbitration clause is broad and it is unclear whether the subject matter of the dispute falls within the scope of arbitration agreement, the question of substantive arbitrability should initially be decided by the arbitrator." *Donaldson,* 124 Ill. 2d at 447-48.

See also *Comdisco, Inc. v. Dun & Bradstreet Corp.,* 306 Ill. App. 3d 197, 203-04 (1999). However, the arbitrator's decision is subject to an "ultimate determination of arbitrability by the court." *Donaldson,* 124 Ill. 2d at 451. A court may vacate an arbitration award if it determines there was no arbitration agreement. See 710 ILCS 5/12(a)(5) (West 1996).

In the present case, each stock option agreement contained a broad arbitration clause. Nonetheless, the parties disagreed as to the scope of the clause. Defendants argued that Salsitz's and D'Ugo's claims for breach of contract and fraud were subject to arbitration and moved to dismiss the complaint. Salsitz and D'Ugo argued their claims for breach of contract were based on an oral agreement between the parties terminating their relationship and providing for the return of Salsitz's and D'Ugo's investments in AUS and were not subject to arbitration pursuant to the arbitration clauses in the stock option agreements. Salsitz and D'Ugo also argued their claims for fraud, although related to the parties' original

agreement to invest in AUS, fell outside the scope of the agreement and were not subject to arbitration.

The municipal court did not decide the issue of arbitrability. Rather, the municipal court stayed Salsitz's and D'Ugo's action, and directed that an arbitrator determine whether their claims were arbitrable. Salsitz and D'Ugo did not pursue arbitration. Instead, on November 17, 1995, Salsitz and D'Ugo nonsuited the action in municipal court. Meanwhile, on November 16, 1995, defendants filed their demand for arbitration, seeking monetary damages for violation of the Illinois Trade Secrets Act, for tortious interference with defendants' existing contracts and with prospective business relations, for breach of contract, and for breach of fiduciary duty. The arbitrator determined that defendants' claims were arbitrable and entered the arbitration award from which plaintiffs seek relief. Under these circumstances, we reject defendants' contentions that the municipal court determined the issue of arbitrability in their favor, and that plaintiffs' amended verified complaints were an effort to relitigate that issue.

B. *Interlocutory Appeal*

Next, defendants renew their argument that in order to preserve the issue of arbitrability, plaintiffs had to file an interlocutory appeal from the chancery court's order of August 19, 1997, denying plaintiffs' motion to stay the arbitration proceedings. Since plaintiffs failed to file an interlocutory appeal, they forfeited their right to contest the arbitrability of disputes arising under the letters of understanding. We reject this argument for two reasons.

First, a party who decides not to file an appeal from an interlocutory order of the circuit court denying a stay of arbitration does not lose the opportunity to contest the arbitrability of the dispute in a subsequent appeal from a final judgment of the court confirming the arbitration award. Supreme Court Rule 307 regulates appeals from interlocutory orders of the circuit court. 188 Ill. 2d R. 307. The rule confers on parties the right to appeal certain interlocutory orders before entry of final judgment by the circuit court. An order of the circuit court to compel or stay arbitration is injunctive in nature and subject to interlocutory appeal under paragraph (a)(1) of the rule. *Notaro v.. Nor-Evan Corp.*, 98 Ill. 2d 268, 271 (1983). The rule, however, does not require that a party appeal from an interlocutory order of the circuit court denying a stay of arbitration. Under the rule, the party has the option of waiting until after final judgment has been entered to seek review of the circuit court's interlocutory order. See *Anderson v. Financial Matters, Inc.*, 285 Ill. App. 3d 123, 135 (1996); *Alpine Bank v. Yancy*, 274 Ill. App. 3d 766, 768 (1995); *Davis v. Bughdadi*, 120 Ill. App. 3d 236, 241 (1983).

The optional nature of Rule 307 is manifest from the language it employs. Rule 307 plainly states that an appeal "may" be taken to the appellate court from an interlocutory order of the circuit court. Use of the word "may" is generally regarded as indicating that action is permissive rather than mandatory. See *People v. Reed*, 177 Ill. 2d 389, 393 (1997). There is no basis for construing the term differently here.

In the present case, plaintiffs could have filed an appeal from the interlocutory order of the chancery court, denying their motion for a stay of arbitration. They did

not do so. However, it was not mandatory that they appeal from the interlocutory order. Plaintiffs could await the final judgment of the chancery court to seek review of the interlocutory order. Thus, plaintiffs' failure to file an appeal from the interlocutory order did not result in a forfeiture of their right to contest the arbitrability of disputes arising under the letters of understanding.

Second, in its order of August 19, 1997, the chancery court did not determine the issue of arbitrability. Rather, the chancery court denied plaintiffs' motion for a temporary restraining order and deferred its ruling on the issue of arbitrability. As noted above, a court may determine that an arbitrator should decide the issue of arbitrability in the first instance. However, the arbitrator's decision is subject to an "ultimate determination of arbitrability by the court." *Donaldson*, 124 Ill. 2d at 451.

As late as January 1999, the chancery court believed that the issue of arbitrability was subject to review. Indeed, the chancery court ruled on the issue, and, because the court believed that the arbitrator's ruling on arbitrability was subject to deference, the court determined not to upset that ruling. In light of the fact that the chancery court did not rule on the issue of arbitrability until January 1999, it would seem anomalous to rule that plaintiffs were required to file an appeal on September 19, 1997, the cutoff date for an interlocutory appeal from the August 19 order, and, having failed to file such an appeal, plaintiffs forfeited their right to contest the arbitrability of claims arising under the letters of understanding. We refuse to so hold.

C. *Arbitration Agreement*

The Illinois Uniform Arbitration Act embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes. *Donaldson,* 124 Ill. 2d at 443; *Flood v. Country Mutual Insurance Co.,* 41 Ill. 2d 91, 93 (1968). Accordingly, the Act empowers the circuit court, upon application of a party to a dispute, to compel or stay arbitration, or to stay court action pending arbitration. *United Cable Television Corp. v. Northwest Illinois Cable Corp.,* 128 Ill. 2d 301, 306 (1989); *Donaldson,* 124 Ill. 2d at 443.

The courts of this state favor arbitration as well. Arbitration is regarded as an effective, expeditious, and cost-efficient method of dispute resolution. *United Cable,* 128 Ill. 2d at 306; *Johnson v. Baumgardt,* 216 Ill. App. 3d 550, 555-56 (1991). Thus, wherever possible, the courts construe arbitration awards so as to uphold their validity. *Rauh v. Rockford Products Corp.,* 143 Ill. 2d 377, 386 (1991); *Christian Dior, Inc. v. Hart Schaffner & Marx,* 265 Ill. App. 3d 427, 431 (1994).

While arbitration is a favored method of dispute resolution, this court has consistently cautioned that an agreement to arbitrate is a matter of contract. *United Cable,* 128 Ill. 2d at 306; *Flood,* 41 Ill. 2d at 93. The parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language. *Rauh,* 143 Ill. 2d at 387; *Flood,* 41 Ill. 2d at 94. An arbitration agreement will not be extended by construction or implication. *Flood,* 41 Ill. 2d at 94.

It follows that, where the arbitrator decides the question of arbitrability in the first instance, the circuit court must review the arbitrator's decision *de novo. Donaldson,* 124 Ill. 2d at 451; *Amgen, Inc. v. Ortho Pharmaceutical Corp.,* 303 Ill. App. 3d 370, 378 (1999). See also *Woonsocket Teachers' Guild, Local 951 v. Woonsocket School Committee,* 770 A.2d 834, 837 (R.I.2001); *DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.,* 748 A.2d 389, 392 (Del.2000) (and cases cited therein); *Ex parte Stamey v. Easter,* 776 So.2d 85, 88 (Ala.2000); *In re Arbitration Between: Independent School District No. 88, New Ulm, Minnesota v. School Service Employees Union Local 284,* 503 N.W.2d 104, 105 (Minn.1993); *Grad v. Wetherholt Galleries,* 660 A.2d 903, 908 (D.C.App.1995); *Oil, Chemical & Atomic Workers International Union v. Lone Star Producing Co.,* 332 S.W.2d 151, 154 (Tex.Civ.App.1959). Were it not so, a party would be bound by the arbitration of disputes he has not agreed to arbitrate and would be left with only a court's deferential review of the arbitrator's decision on the question of arbitrability. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942, 131 L. Ed. 2d 985, 992, 115 S.Ct. 1920, 1923 (1995). We agree with the court's observation in *Grad:*

> "To require any degree of judicial deference to an arbitrator's decision regarding arbitrability where a proper objection to the arbitrator's authority has been lodged would vitiate the consent basis of statutory arbitration by permitting an arbitrator to clothe herself with actual authority, based on the agreement of the one party asserting the claim. * * * [A]ny judicial determination of arbitrability is necessarily *de novo.*" *Grad,* 660 A.2d at 908.

There are, of course, instances where the parties agree to submit the question of arbitrability itself to arbitration. In those instances, the circuit court should review the question of arbitrability deferentially, that is, the court's standard for reviewing the arbitrator's decision on arbitrability should be the same standard courts apply when they review any other matter that the parties have agreed to arbitrate. *First Options*, 514 U.S. at 943, 131 L. Ed. 2d at 993, 115 S.Ct. at 1923; *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 656, 106 S.Ct. 1415, 1418 (1986). But, as the Court cautioned in *First Options:*

> "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. [Citations.] In this manner the law treats silence or ambiguity about the question *'who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question *'whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' – for in respect to this latter question the law reverses the presumption. [Citations.]
>
> * * * [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." (Emphases in

original.) *First Options*, 514 U.S. at 944-45, 131 L. Ed. 2d at 994, 115 S.Ct. at 1924-25.

In the present case, nothing in the stock option agreements indicates that the parties intended to submit the question of arbitrability to arbitration. It follows that the chancery court should have reviewed the question of arbitrability *de novo*. Further, since the question of arbitrability is one of contract law, it also follows that our review of the chancery court's order confirming the arbitration award and dismissing the amended verified complaints is *de novo*. *First Options*, 514 U.S. at 948, 131 L. Ed. 2d at 996, 115 S.Ct. at 1926.

The stock option agreements provided that defendants would issue a stock option incentive bonus, consisting of an option to purchase 35 shares of common stock, to the individual participant for every kilowatt of wholesale electric contracted for and sold by the participant, or for every kilowatt of wholesale electric projects for which the participant provided or secured nonrecourse funding. Each stock option agreement contained an arbitration clause binding the individual participant and defendants to arbitrate disputes arising under the stock option agreement. The stock option agreements, however, were separate agreements from the letters of understanding. And while each stock option agreement contained an arbitration clause, the letters of understanding did not.

In their demand for arbitration, defendants sought an injunction preventing plaintiffs from unfairly competing with AUS, and sought monetary damages for violation of the Illinois Trade Secrets Act, for tortious interference with defendants' existing contracts and with prospective

business relations, for breach of contract, and for breach of fiduciary duty. Thus, the disputes between the parties, as framed by the demand for arbitration, arose from the letters of understanding, that is to say, from plaintiffs' agreement to invest in AUS; plaintiffs' participation in AUS management; plaintiffs' termination of their relationship with AUS; and various actions detrimental to AUS that plaintiffs took once the relationship ended. The disputes between the parties did not arise from the stock option incentive bonus defendants committed to give plaintiffs based upon plaintiffs' performance with AUS. As such, the disputes between the parties did not fall within the scope of the arbitration clauses and were not subject to arbitration.

The chancery court erred in confirming the award of the arbitrator and dismissing plaintiffs' amended verified complaints.

D. *Waiver*

Citing *Tri-City Jewish Center v. Blass Riddick Chilcote,* 159 Ill. App. 3d 436 (1987), defendants maintain that plaintiffs waived any objections to arbitrability by participating in the arbitration hearings. We disagree.

In *Tri-City,* the defendant made a demand for arbitration in December of 1983, and the arbitration hearings were held in November of 1985. By letter dated April 24, 1984, the plaintiff advised the American Arbitration Association that the dispute might not be arbitrable and it might seek a court-ordered stay of the proceedings. However, the plaintiff did not challenge the jurisdiction of the arbitration panel prior to the hearings. In February of

1986, the arbitrators rendered an award granting $65,000 to the defendant in payment of its fees and $40,000 to the plaintiff for damages. The plaintiff subsequently filed suit seeking to vacate the arbitration award. The circuit court found that the plaintiff had waived its objections to the arbitration by participating in the proceedings, and dismissed the complaint.

The appellate court affirmed the dismissal of the complaint. The court noted that any issue regarding the arbitrability of a dispute is waived by participation in the arbitration proceedings. Although the plaintiff had notified the American Arbitration Association that it might seek a court-ordered stay of the proceedings, the plaintiff had not done so. The court deemed the issue of arbitrability waived inasmuch as it was raised by the plaintiff subsequent to the rendition of the arbitration award. *Tri-City*, 159 Ill. App. 3d at 439.

Tri-City is inapposite. In the present case, plaintiffs objected to the arbitration proceedings in a timely manner. At the introductory hearing with the arbitrator, Salsitz and D'Ugo objected that no agreement to arbitrate existed. Thereafter, on August 8, 1997, plaintiffs filed a verified complaint in chancery court for declaratory and injunctive relief, seeking to stay and permanently enjoin the arbitration proceedings on the grounds that no agreement to arbitrate existed. Plaintiffs also sought a declaration that the arbitration clauses did not apply to any dispute under the letters of understanding and, in particular, to the claims in the arbitration proceedings. In addition, on August 13, 1997, plaintiffs filed a motion for a stay of arbitration, and, on August 15, 1997, plaintiffs filed a motion for a temporary restraining order to enjoin

the continuation of the arbitration hearings. The arbitrator rendered the award on January 18, 1998. A timely objection preserves the right to challenge an award, even where the parties participate in the arbitration proceedings. *Ure v. Wangler Construction Co.*, 232 Ill. App. 3d 492, 499 (1992); *Bisluk v. Town Realty, Inc.*, 90 Ill. App. 3d 1039 (1980); 710 ILCS 5/12(a)(5) (West 1996).

We hold that plaintiffs did not waive their objections to the arbitrability of the disputes.

CONCLUSION

We conclude that plaintiffs did not agree to arbitrate the disputes defendants submitted for arbitration. The chancery court should have vacated the arbitration award entered in defendants' favor. In light of this holding, we need not address the other issues raised on appeal.

We reverse the judgments of the appellate court and circuit court, and we vacate the arbitration award.

Appellate court judgment reversed;
circuit court judgment reversed;
award vacated.

Supplemental Opinion Upon Denial of Rehearing

Upon denial of defendants' petition for rehearing, we find it appropriate to comment briefly upon one of the arguments raised by defendants in the petition.

This court filed an opinion in this matter on December 1, 2000. In that opinion, we noted that plaintiffs had failed to file an interlocutory appeal from the chancery

court's order denying their motion to stay arbitration. We held, *inter alia*, that plaintiffs could no longer contend that their dispute with defendants was not subject to arbitration. On December 22, 2000, plaintiffs filed a petition for rehearing in which they maintained that the language of Supreme Court Rule 307(a)(1) is permissive and, consequently, this court was mistaken in requiring plaintiffs to have filed an interlocutory appeal from the chancery court's order denying their motion for a stay of arbitration. We granted plaintiffs' petition for rehearing and ordered additional briefing on the matter to consider the propriety of our construction of Rule 307.

In their petition for rehearing, defendants maintain that, in reversing the holding of our December 1, 2000, opinion, this court has violated the principle of *stare decisis*. We disagree.

In our view, defendants' argument overlooks the role of rehearing in appellate practice and its effect on the application of *stare decisis*. As observed by the special concurrence in *Berg v. Allied Security, Inc.*, 193 Ill. 2d 186, 191-92 (2000) (Freeman, J., specially concurring):

> "Once this court issues an opinion, our rules of appellate procedure provide the nonprevailing party with the opportunity for rehearing in order to apprise the court of points the party believes were 'overlooked or misapprehended.' 134 Ill. 2d R. 367(b). 'The right to apply for a rehearing is not given by the statute, but is a matter of grace or favor, growing largely out of the willingness of the court to correct any inadvertent error.' *Vickers v. Tyndall*, 168 Ill. 616, 617 (1897). This rule exists so that the court can correct errors 'into which the court may have

> inadvertently fallen in deciding the case as originally presented.' *Matthews v. Granger,* 196 Ill. 164, 170 (1902). This court has previously noted that the filing of a petition for rehearing does not alter the effective date of the judgment unless the court allows the petition, in which case the effective date of judgment is the date that judgment is entered on rehearing. See *PSL Realty Co. v. Granite Investment Co.,* 86 Ill. 2d 291 (1981); *Glasser v. Essaness Theatres Corp.,* 346 Ill. App. 72 (1952) (noting that when a petition for rehearing is filed, the judgment of the reviewing court does not become final until the petition is denied)."

In the present case, once plaintiffs filed their petition for rehearing and this court determined that the petition should be allowed, the original December 1, 2000, decision could not be considered a final opinion. Given the importance of *stare decisis,* we believe that it was better to reconsider the matters raised by plaintiffs on the petition for rehearing before our opinion became final, rather than using a later case to limit or overrule our decision, particularly since this case concerned the application of one of the rules of this court. Granting plaintiffs' petition for rehearing was not an affront to the principle of *stare decisis.*

Defendants have not cited any opinions in support of the proposition that the principle of *stare decisis* applies to decisions which are not yet final. We note that defendants' argument ignores this court's admonishment that opinions which are not yet final may not be cited as legal precedent. Further, we note that applying the principle of *stare decisis* to opinions which are not yet final means that

a court could never grant a petition for rehearing, correct errors in the opinion, and perhaps reconsider the disposition of the case. Defendants' argument is untenable.

SUPREME COURT OF ILLINOIS

Docket No. 89156 – Agenda 18 – May 2001.

NEIL SALSITZ *et al.*, Appellants, v.
FRITZ KREISS *et al.*, Appellees.

(Filed Sep. 20, 2001)

JUSTICE FREEMAN delivered the opinion of the court:

At issue in this case is the arbitrability of certain disputes between plaintiffs, Neil Salsitz, Biagio D'Ugo, and New Horizon Productions, Ltd., and defendants, Fritz Kreiss and Alternative Utility Services of IL, Inc.

BACKGROUND

On March 9, 1994, Neil Salsitz and Biagio D'Ugo executed letters of understanding, dated November 17, 1993, whereby each agreed to invest $6,500 in Alternative Utility Services of IL, Inc. (AUS). Fritz Kreiss executed the letters of understanding as president of AUS. The letters of understanding do not contain an arbitration clause. Also on March 9, 1994, Salsitz and D'Ugo each executed a document denominated:

> "Addendum 1, Letter of Understanding dated November 17, 1993
>
> INCENTIVE STOCK OPTION PROGRAM."

These documents contained an arbitration clause providing in part:

> "In the event there are any claims or disputes between PARTIES hereto, such claims or disputes shall be submitted by the PARTIES for

> resolution and binding arbitration within Lake County, IL, in accordance with the rules of the American Arbitration Association as in effect under IL law."

On June 17, 1994, Salsitz and D'Ugo requested the return of their investment and reimbursement of certain expenses they had incurred. On July 21, 1994, Kreiss returned Salsitz's and D'Ugo's original investment. However, Kreiss did not reimburse Salsitz's and D'Ugo's expenses. Salsitz and D'Ugo then filed suit in the municipal division of the circuit court (municipal court) for breach of contract and fraud, seeking $29,888.58 in unpaid expenses.

Kreiss and AUS moved to dismiss the municipal court action based upon the presence of the arbitration clauses in the stock option agreements. Salsitz and D'Ugo filed a response denying that they agreed to arbitrate the claims at issue, arguing that there was no agreement to arbitrate since the arbitration clauses were in the stock option agreements, not the letters of understanding. Salsitz and D'Ugo also argued that the contracts had been rescinded.

On February 15, 1995, the municipal court ordered the civil action stayed and directed that an arbitrator determine whether particular matters were arbitrable. Salsitz and D'Ugo did not pursue arbitration. However, Kreiss and AUS filed their own demand for arbitration on November 16, 1995. In their demand for arbitration, Kreiss and AUS sought an injunction preventing Salsitz, D'Ugo and New Horizon Productions, Ltd. (New Horizon), from unfairly competing with AUS, and sought monetary damages for violation of the Illinois Trade

Secrets Act, for tortious interference with defendants' existing contracts and with prospective business relations, for breach of contract, and for breach of fiduciary duty. On November 17, 1995, Salsitz and D'Ugo nonsuited the action in municipal court. At that point, all that remained before the court was Kreiss and AUS's demand for arbitration.

Several arbitration hearings were held in 1996 and 1997. On August 8, 1997, Salsitz, D'Ugo and New Horizon filed a verified complaint in chancery court for declaratory and injunctive relief, seeking to stay and permanently enjoin the arbitration proceedings on the grounds that no agreement to arbitrate existed. Plaintiffs also sought a declaration that the arbitration clauses did not apply to any dispute under the letters of understanding, and, in particular, to the claims in the arbitration proceedings. In addition, on August 13, 1997, plaintiffs filed a motion for a stay of arbitration, and, on August 15, 1997, plaintiffs filed a motion for a temporary restraining order to enjoin the continuation of the arbitration hearings. On August 19, 1997, the chancery court denied plaintiffs' motion for a temporary restraining order. As explained by the court at a later hearing:

> "This case first came to this Court during the pendency of an arbitration hearing. At that time, on or about August 19, 1997, then Counsel for Plaintiffs Salsitz, D'Ugo and the New Horizon Productions asked this Court to stay an arbitration proceeding commencing between the parties. The issue addressed during the emergency motion was a determination as to the arbitrability of the issues. Although this Court did not enter a stay of the arbitration Proceedings at

> that time, the Court did leave it open for parties to address the issue at a later date."

The arbitration continued. On September 23, 1997, plaintiffs filed an amended motion for a stay of arbitration, asserting that no agreement to arbitrate existed. On October 9, 1997, the chancery court denied plaintiffs' amended motion for a stay. Thereafter, the arbitrator notified the parties that the final arbitration hearings would be held on December 10, 1997. Plaintiffs did not appear for those hearings. The arbitrator heard evidence from defendants regarding damages that they sustained. On December 11, 1997, the arbitrator declared the hearings closed, and issued a notice to plaintiffs on December 24, 1997. The notice informed plaintiffs that the arbitrator would issue an award within 30 days. Plaintiffs did not file a motion to reopen the hearings. On January 10, 1998, the arbitrator awarded defendants $3,761,174.40 in actual damages, and $2.5 million in punitive damages.

On January 21, 1998, defendants filed an application for confirmation of the arbitration award and for entry of judgment on the award. Plaintiffs opposed confirmation of the arbitration award; asked that the chancery court review the arbitrator's determination of arbitrability; asked that the court vacate the arbitration award; and asked for leave to file an amended complaint, requesting that the court vacate the arbitration award. Subsequently, on June 12, 1998, Salsitz and New Horizon amended their complaint to add a count seeking to vacate the arbitration award. D'Ugo also amended his complaint to add a count seeking to vacate the arbitration award. In the amended verified complaints, plaintiffs alleged, *inter alia,* that the arbitration award was obtained through undue means,

citing misleading communications between the arbitrator and plaintiffs. Plaintiffs complained that the arbitrator should not have conducted the hearing on December 10, 1997, in plaintiffs' absence, and should not have closed the hearings without giving plaintiffs an opportunity to present evidence. Plaintiffs alleged that they did not know the law firm, which had represented plaintiffs at the earlier hearings, had decided to cease representing plaintiffs and, consequently, did not appear on plaintiffs' behalf at the hearing on December 10.

Thereafter, defendants filed a motion to dismiss plaintiffs' amended verified complaints. At a hearing on January 27, 1999, the chancery court noted that the issue of arbitrability and defendants' motion to dismiss plaintiffs' amended complaints were intertwined. The court stated that it would first "address whether or not there could be arbitration of the agreement or agreements involved in the business relationship that was entered into by the parties." The court believed, however, that it could not upset or invalidate the arbitrator's ruling as to the arbitrability of the issues because the arbitrator's ruling was entitled to deference. The court reasoned:

> "[T]he Court finds that it cannot upset or invalidate the arbitrator's rulings as to the arbitrability of the issues * * * . The Court and the parties are both aware that – this is in parenthesis. Now I am quoting a case 'Judicial review of arbitration award is restricted. Courts encourage settlement of disputes by arbitration; and accordingly, judicial review of an arbitration award is more limited than Appellate review of a Circuit Court's decision. Courts must construe an arbitration award whenever possible to

> uphold their validity. Limited judicial review fosters the long accepted and encouraged principles that arbitration awards should be the end and not the beginning of litigation.' "

The court dismissed plaintiffs' amended verified complaints, affirmed the arbitrator's award of actual damages, and vacated the award of punitive damages.

Within 30 days of this final ruling, plaintiffs appealed from the order dismissing their amended verified complaints. Defendants moved to dismiss the appeals as untimely under Supreme Court Rule 307(a)(1) (188 Ill.2d R. 307(a)(1)). Defendants argued, *inter alia,* that plaintiffs should have filed an interlocutory appeal from the denial of plaintiffs' motion to stay the arbitration proceedings. Since plaintiffs failed to file an interlocutory appeal, they forfeited their right to contest the arbitrability of the letters of understanding. The appellate court granted the motion to dismiss as to the issue of arbitrability, but denied the motion as to the remaining issues. Having considered those issues on the merits, the appellate court affirmed the chancery court's order. 311 Ill.App.3d 590. We allowed plaintiffs' petition for leave to appeal.

ANALYSIS

A. *Res Judicata*

Defendants maintain that, in its order of February 15, 1995, the municipal court determined the issue of arbitrability in defendants' favor. Salsitz and D'Ugo did not appeal that order. Defendants note that the amended verified complaints plaintiffs subsequently filed in chancery court sought to stay and permanently enjoin the

arbitration proceedings on the grounds that no agreement to arbitrate existed, and sought a declaration that the arbitration clauses were invalid or nonbinding. Defendants conclude the chancery court was correct in dismissing plaintiffs' amended verified complaints because the doctrine of *res judicata* barred relitigation of the issue of arbitrability. We disagree.

In *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr,* 124 Ill.2d 435 (1988), this court explained when it is appropriate for the circuit court to determine the issue of arbitrability in the first instance:

> "Where the language of the arbitration agreement is clear, and it is apparent that the dispute sought to be arbitrated falls within the scope of the arbitration clause, the court should decide the arbitrability issue and compel arbitration. [Citations.] Similarly, if it is apparent that the issue sought to be arbitrated is not within the ambit of the arbitration clause, the court should decide the arbitrability issue in favor of the opposing party, because there is no agreement to arbitrate. [Citations.] 'Thus, the arbitrability issue emerges as essentially one of giving effect to the parties' expressed intention about the use of arbitration.' [Citation.] The paramount factor in determining the parties' intention is the scope of the arbitration clause in the contract." *Donaldson,* 124 Ill.2d at 445.

This court noted, however, that a problem arises when the parties broadly agree to arbitrate and it is still unclear whether the subject matter of the dispute falls within the scope of the arbitration agreement. When the issue of contractual intention is reasonably debatable, should the

determination of arbitrability be made by the court or by the arbitrator in the first instance? Having examined cases from other jurisdictions and reviewed the intent of the drafters of the Uniform Arbitration Act (see 710 ILCS 5/1 *et seq.* (West 1996)), this court held that:

> "when the language of an arbitration clause is broad and it is unclear whether the subject matter of the dispute falls within the scope of arbitration agreement, the question of substantive arbitrability should initially be decided by the arbitrator." *Donaldson,* 124 Ill.2d at 447-48.

See also *Comdisco, Inc. v. Dun & Bradstreet Corp.,* 306 Ill.App.3d 197, 203-04 (1999). However, the arbitrator's decision is subject to an "ultimate determination of arbitrability by the court." *Donaldson,* 124 Ill.2d at 451. A court may vacate an arbitration award if it determines there was no arbitration agreement. See 710 ILCS 5/12(a)(5) (West 1996).

In the present case, each stock option agreement contained a broad arbitration clause. Nonetheless, the parties disagreed as to the scope of the clause. Defendants argued that Salsitz's and D'Ugo's claims for breach of contract and fraud were subject to arbitration and moved to dismiss the complaint. Salsitz and D'Ugo argued their claims for breach of contract were based on an oral agreement between the parties terminating their relationship and providing for the return of Salsitz's and D'Ugo's investments in AUS and were not subject to arbitration pursuant to the arbitration clauses in the stock option agreements. Salsitz and D'Ugo also argued their claims for fraud, although related to the parties' original

agreement to invest in AUS, fell outside the scope of the agreement and were not subject to arbitration.

The municipal court did not decide the issue of arbitrability. Rather, the municipal court stayed Salsitz's and D'Ugo's action, and directed that an arbitrator determine whether their claims were arbitrable. Salsitz and D'Ugo did not pursue arbitration. Instead, on November 17, 1995, Salsitz and D'Ugo nonsuited the action in municipal court. Meanwhile, on November 16, 1995, defendants filed their demand for arbitration, seeking monetary damages for violation of the Illinois Trade Secrets Act, for tortious interference with defendants' existing contracts and with prospective business relations, for breach of contract, and for breach of fiduciary duty. The arbitrator determined that defendants' claims were arbitrable and entered the arbitration award from which plaintiffs seek relief. Under these circumstances, we reject defendants' contentions that the municipal court determined the issue of arbitrability in their favor, and that plaintiffs' amended verified complaints were an effort to relitigate that issue.

B. *Interlocutory Appeal*

Next, defendants renew their argument that in order to preserve the issue of arbitrability, plaintiffs had to file an interlocutory appeal from the chancery court's order of August 19, 1997, denying plaintiffs' motion to stay the arbitration proceedings. Since plaintiffs failed to file an interlocutory appeal, they forfeited their right to contest the arbitrability of disputes arising under the letters of understanding. We reject this argument for two reasons.

First, a party who decides not to file an appeal from an interlocutory order of the circuit court denying a stay of arbitration does not lose the opportunity to contest the arbitrability of the dispute in a subsequent appeal from a final judgment of the court confirming the arbitration award. Supreme Court Rule 307 regulates appeals from interlocutory orders of the circuit court. 188 Ill.2d R. 307. The rule confers on parties the right to appeal certain interlocutory orders before entry of final judgment by the circuit court. An order of the circuit court to compel or stay arbitration is injunctive in nature and subject to interlocutory appeal under paragraph (a)(1) of the rule. *Notaro v. Nor-Evan Corp.*, 98 Ill.2d 268, 271 (1983). The rule, however, does not require that a party appeal from an interlocutory order of the circuit court denying a stay of arbitration. Under the rule, the party has the option of waiting until after final judgment has been entered to seek review of the circuit court's interlocutory order. See *Anderson v. Financial Matters, Inc.*, 285 Ill.App.3d 123, 135 (1996); *Alpine Bank v. Yancy*, 274 Ill.App.3d 766, 768 (1995); *Davis v. Bughdadi*, 120 Ill.App.3d 236, 241 (1983).

The optional nature of Rule 307 is manifest from the language it employs. Rule 307 plainly states that an appeal "may" be taken to the appellate court from an interlocutory order of the circuit court. Use of the word "may" is generally regarded as indicating that action is permissive rather than mandatory. See *People v. Reed*, 177 Ill.2d 389, 393 (1997). There is no basis for construing the term differently here.

In the present case, plaintiffs could have filed an appeal from the interlocutory order of the chancery court, denying their motion for a stay of arbitration. They did

not do so. However, it was not mandatory that they appeal from the interlocutory order. Plaintiffs could await the final judgment of the chancery court to seek review of the interlocutory order. Thus, plaintiffs' failure to file an appeal from the interlocutory order did not result in a forfeiture of their right to contest the arbitrability of disputes arising under the letters of understanding.

Second, in its order of August 19, 1997, the chancery court did not determine the issue of arbitrability. Rather, the chancery court denied plaintiffs' motion for a temporary restraining order and deferred its ruling on the issue of arbitrability. As noted above, a court may determine that an arbitrator should decide the issue of arbitrability in the first instance. However, the arbitrator's decision is subject to an "ultimate determination of arbitrability by the court." *Donaldson*, 124 Ill.2d at 451.

As late as January 1999, the chancery court believed that the issue of arbitrability was subject to review. Indeed, the chancery court ruled on the issue, and, because the court believed that the arbitrator's ruling on arbitrability was subject to deference, the court determined not to upset that ruling. In light of the fact that the chancery court did not rule on the issue of arbitrability until January 1999, it would seem anomalous to rule that plaintiffs were required to file an appeal on September 19, 1997, the cutoff date for an interlocutory appeal from the August 19 order, and, having failed to file such an appeal, plaintiffs forfeited their right to contest the arbitrability of claims arising under the letters of understanding. We refuse to so hold.

C. *Arbitration Agreement*

The Illinois Uniform Arbitration Act embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes. *Donaldson,* 124 Ill.2d at 443; *Flood v. Country Mutual Insurance Co.,* 41 Ill.2d 91, 93 (1968). Accordingly, the Act empowers the circuit court, upon application of a party to a dispute, to compel or stay arbitration, or to stay court action pending arbitration. *United Cable Television Corp. v. Northwest Illinois Cable Corp.,* 128 Ill.2d 301, 306 (1989); *Donaldson,* 124 Ill.2d at 443.

The courts of this state favor arbitration as well. Arbitration is regarded as an effective, expeditious, and cost-efficient method of dispute resolution. *United Cable,* 128 Ill.2d at 306; *Johnson v. Baumgardt,* 216 Ill.App.3d 550, 555-56 (1991). Thus, wherever possible, the courts construe arbitration awards so as to uphold their validity. *Rauh v. Rockford Products Corp.,* 143 Ill.2d 377, 386 (1991); *Christian Dior, Inc. v. Hart Schaffner & Marx,* 265 Ill.App.3d 427, 431 (1994).

While arbitration is a favored method of dispute resolution, this court has consistently cautioned that an agreement to arbitrate is a matter of contract. *United Cable,* 128 Ill.2d at 306; *Flood,* 41 Ill.2d at 93. The parties to an agreement are bound to arbitrate only those issues they have agreed to arbitrate, as shown by the clear language of the agreement and their intentions expressed in that language. *Rauh,* 143 Ill.2d at 387; *Flood,* 41 Ill.2d at 94. An arbitration agreement will not be extended by construction or implication. *Flood,* 41 Ill.2d at 94.

It follows that, where the arbitrator decides the question of arbitrability in the first instance, the circuit court must review the arbitrator's decision *de novo*. *Donaldson*, 124 Ill.2d at 451; *Amgen, Inc. v. Ortho Pharmaceutical Corp.*, 303 Ill.App.3d 370, 378 (1999). See also *Woonsocket Teachers' Guild, Local 951 v. Woonsocket School Committee*, 770 A.2d 834, 837 (R.I. 2001); *DMS Properties-First, Inc. v. P.W. Scott Associates, Inc.*, 748 A.2d 389, 392 (Del. 2000) (and cases cited therein); *Ex parte Stamey v. Easter*, 776 So.2d 85, 88 (Ala. 2000); *In re Arbitration Between: Independent School District No. 88, New Ulm, Minnesota v. School Service Employees Union Local 284*, 503 N.W.2d 104, 105 (Minn. 1993); *Grad v. Wetherholt Galleries*, 660 A.2d 903, 908 (D.C. App. 1995); *Oil, Chemical & Atomic Workers International Union v. Lone Star Producing Co.*, 332 S.W.2d 151, 154 (Tex. Civ. App. 1959). Were it not so, a party would be bound by the arbitration of disputes he has not agreed to arbitrate and would be left with only a court's deferential review of the arbitrator's decision on the question of arbitrability. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 131 L. Ed. 2d 985, 992, 115 S. Ct. 1920, 1923 (1995). We agree with the court's observation in *Grad*:

> "To require any degree of judicial deference to an arbitrator's decision regarding arbitrability where a proper objection to the arbitrator's authority has been lodged would vitiate the consent basis of statutory arbitration by permitting an arbitrator to clothe herself with actual authority, based on the agreement of the one party asserting the claim. * * * [A]ny judicial determination of arbitrability is necessarily *de novo*." *Grad*, 660 A.2d at 908.

There are, of course, instances where the parties agree to submit the question of arbitrability itself to arbitration. In those instances, the circuit court should review the question of arbitrability deferentially, that is, the court's standard for reviewing the arbitrator's decision on arbitrability should be the same standard courts apply when they review any other matter that the parties have agreed to arbitrate. *First Options*, 514 U.S. at 943, 131 L. Ed. 2d at 993, 115 S. Ct. at 1923; *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 89 L. Ed. 2d 648, 656, 106 S. Ct. 1415, 1418 (1986). But, as the Court cautioned in *First Options:*

> "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. [Citations.] In this manner the law treats silence or ambiguity about the question *'who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question *'whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' – for in respect to this latter question the law reverses the presumption. [Citations.]
>
> * * * [G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." (Emphases in

original.) *First Options*, 514 U.S. at 944-45, 131 L. Ed. 2d at 994, 115 S. Ct. at 1924-25.

In the present case, nothing in the stock option agreements indicates that the parties intended to submit the question of arbitrability to arbitration. It follows that the chancery court should have reviewed the question of arbitrability *de novo*. Further, since the question of arbitrability is one of contract law, it also follows that our review of the chancery court's order confirming the arbitration award and dismissing the amended verified complaints is *de novo*. *First Options*, 514 U.S. at 948, 131 L. Ed. 2d at 996, 115 S. Ct. at 1926.

The stock option agreements provided that defendants would issue a stock option incentive bonus, consisting of an option to purchase 35 shares of common stock, to the individual participant for every kilowatt of wholesale electric contracted for and sold by the participant, or for every kilowatt of wholesale electric projects for which the participant provided or secured nonrecourse funding. Each stock option agreement contained an arbitration clause binding the individual participant and defendants to arbitrate disputes arising under the stock option agreement. The stock option agreements, however, were separate agreements from the letters of understanding. And while each stock option agreement contained an arbitration clause, the letters of understanding did not.

In their demand for arbitration, defendants sought an injunction preventing plaintiffs from unfairly competing with AUS, and sought monetary damages for violation of the Illinois Trade Secrets Act, for tortious interference with defendants' existing contracts and with prospective

business relations, for breach of contract, and for breach of fiduciary duty. Thus, the disputes between the parties, as framed by the demand for arbitration, arose from the letters of understanding, that is to say, from plaintiffs' agreement to invest in AUS; plaintiffs' participation in AUS management; plaintiffs' termination of their relationship with AUS; and various actions detrimental to AUS that plaintiffs took once the relationship ended. The disputes between the parties did not arise from the stock option incentive bonus defendants committed to give plaintiffs based upon plaintiffs' performance with AUS. As such, the disputes between the parties did not fall within the scope of the arbitration clauses and were not subject to arbitration.

The chancery court erred in confirming the award of the arbitrator and dismissing plaintiffs' amended verified complaints.

D. *Waiver*

Citing *Tri-City Jewish Center v. Blass Riddick Chilcote,* 159 Ill. App. 3d 436 (1987), defendants maintain that plaintiffs waived any objections to arbitrability by participating in the arbitration hearings. We disagree.

In *Tri-City,* the defendant made a demand for arbitration in December of 1983, and the arbitration hearings were held in November of 1985. By letter dated April 24, 1984, the plaintiff advised the American Arbitration Association that the dispute might not be arbitrable and it might seek a court-ordered stay of the proceedings. However, the plaintiff did not challenge the jurisdiction of the

arbitration panel prior to the hearings. In February of 1986, the arbitrators rendered an award granting $65,000 to the defendant in payment of its fees and $40,000 to the plaintiff for damages. The plaintiff subsequently filed suit seeking to vacate the arbitration award. The circuit court found that the plaintiff had waived its objections to the arbitration by participating in the proceedings, and dismissed the complaint.

The appellate court affirmed the dismissal of the complaint. The court noted that any issue regarding the arbitrability of a dispute is waived by participation in the arbitration proceedings. Although the plaintiff had notified the American Arbitration Association that it might seek a court-ordered stay of the proceedings, the plaintiff had not done so. The court deemed the issue of arbitrability waived inasmuch as it was raised by the plaintiff subsequent to the rendition of the arbitration award. *Tri-City*, 159 Ill.App.3d at 439.

Tri-City is inapposite. In the present case, plaintiffs objected to the arbitration proceedings in a timely manner. At the introductory hearing with the arbitrator, Salsitz and D'Ugo objected that no agreement to arbitrate existed. Thereafter, on August 8, 1997, plaintiffs filed a verified complaint in chancery court for declaratory and injunctive relief, seeking to stay and permanently enjoin the arbitration proceedings on the grounds that no agreement to arbitrate existed. Plaintiffs also sought a declaration that the arbitration clauses did not apply to any dispute under the letters of understanding and, in particular, to the claims in the arbitration proceedings. In addition, on August 13, 1997, plaintiffs filed a motion for a stay of arbitration, and, on August 15, 1997, plaintiffs

filed a motion for a temporary restraining order to enjoin the continuation of the arbitration hearings. The arbitrator rendered the award on January 18, 1998. A timely objection preserves the right to challenge an award, even where the parties participate in the arbitration proceedings. *Ure v. Wangler Construction Co.*, 232 Ill. App. 3d 492, 499 (1992); *Bisluk v. Town Realty, Inc.*, 90 Ill. App. 3d 1039 (1980); 710 ILCS 5/12(a)(5) (West 1996).

We hold that plaintiffs did not waive their objections to the arbitrability of the disputes.

CONCLUSION

We conclude that plaintiffs did not agree to arbitrate the disputes defendants submitted for arbitration. The chancery court should have vacated the arbitration award entered in defendants' favor. In light of this holding, we need not address the other issues raised on appeal.

We reverse the judgments of the appellate court and circuit court, and we vacate the arbitration award.

Appellate court judgment reversed;
circuit court judgment reversed;
award vacated.

[SEAL]

SUPREME COURT OF ILLINOIS

January 29, 2001

[Names And Addresses Omitted In Printing]

Mr. Alan O. Amos
Alan O. Amos & Associates, P.C.
180 N. LaSalle St., Suite 3150
Chicago, IL 60601

In re: Neil Salsitz et al., etc., appellants, v. Fritz Kreiss et al., etc., appellees. Appeal, Appellate Court, First District, No. 89156

Dear Mr. Amos:

The Supreme Court today ALLOWED the petition for rehearing in the above entitled cause.

The answers of appellees are due on or before February 19, 2001, and the replies are due on or before March 5, 2001.

Oral argument will be entertained.

cc: Mr. Mark Szaflarski
Mr. Anthony E. Blumberg

SUPREME COURT OF ILLINOIS

Docket No. 89156 – Agenda 29 – September 2000.
NEIL SALSITZ *et al.*, Appellants, v. FRITZ KREISS *et al.*, Appellees.

(Filed Dec. 1, 2000)

JUSTICE HEIPLE delivered the opinion of the court:

Under Supreme Court Rule 307(a), does a party who fails to appeal from an order denying a stay of arbitration lose the opportunity to contest the arbitrability of the dispute in a subsequent appeal of the arbitration award? The answer is yes.

In 1996 and 1997, plaintiffs Neil Salsitz, Biago D'Ugo and New Horizons Productions, Ltd., participated in arbitration of a dispute they had with defendants Fritz Kreiss and Alternative Utility Services of IL, Inc., over a joint business venture. On August 8, 1997, plaintiffs filed a complaint in the circuit court of Cook County seeking an injunction to stay the arbitration on the grounds that the matter was not subject to arbitration. On August 19, 1997, the circuit court denied the request for injunction. Plaintiffs did not appeal this order. After due notice to plaintiffs, final arbitration hearings were held on December 10 and 11, 1997. Plaintiffs did not appear at these hearings. On January 10, 1998, an arbitration award of $3,761,174.40 in compensatory damages and $1,250,000 in punitive damages was entered in favor of defendants. Plaintiffs did not move to reopen the arbitration hearings. The circuit court confirmed the award of compensatory damages, but rejected the punitive damages award.

On appeal, plaintiffs argued that the circuit court erred in denying their request for a stay of arbitration

because the dispute was not subject to arbitration. The appellate court held that it had no jurisdiction to entertain this argument because plaintiffs failed to file an interlocutory appeal from the circuit court's denial of their motion to stay arbitration. 311 Ill. App. 3d 590, 593. The appellate court then affirmed the circuit court's confirmation of the arbitration award. 311 Ill. App. 3d at 596.

Before this court, plaintiffs renew their contention that the dispute is not subject to arbitration, and assert that the appellate court erred in holding that it lacked jurisdiction to entertain this contention. Plaintiffs concede that Rule 307(a) authorizes the interlocutory appeal of a denial of a motion to stay arbitration, but argue that such an interlocutory appeal is not required in order to preserve the issue of nonarbitrability. Plaintiffs are incorrect. Rule 307(a) lists specific types of interlocutory orders which are immediately appealable, and provides that "the appeal must be perfected within 30 days from the entry of the interlocutory order * * * ." If no appeal is taken from one of the types of orders enumerated in Rule 307(a), the order becomes final and is not subject to subsequent challenge on appeal. To the extent they conflict with this holding, *Anderson v. Financial Matters, Inc.*, 285 Ill. App. 3d 123, 135 (1996), and *Alpine Bank v. Yancy*, 274 Ill. App. 3d 766 (1995), are overruled. Because plaintiffs did not appeal the circuit court's denial of their motion to stay arbitration, they may no longer contest the arbitrability of the dispute.

Plaintiffs also raise several arguments contesting the arbitration award itself. First, plaintiffs contend that the arbitrator should not have proceeded with arbitration when plaintiffs failed to appear at the hearings on

December 10, 1997. As the appellate court noted, however, the rules of the American Arbitration Association, which govern this dispute, specifically permit the arbitrator to proceed in the absence of any party who, after due notice, fails to obtain a postponement. 311 Ill. App. 3d at 594. Furthermore, after the close of the hearings, plaintiffs failed to file a motion to reopen the hearings. We find no error in the arbitrator's decision to proceed with the hearings.

Plaintiffs next argue that the arbitration award was unjustified because the contract between the parties was mutually rescinded when defendants returned plaintiffs' original monetary investment to plaintiffs prior to arbitration. Plaintiffs overlook, however, the fact that defendants' dispute with plaintiffs centered primarily on plaintiffs' use of confidential proprietary information concerning defendants' company. The mere return of plaintiffs' investment thus did not suffice to rescind the contract.

Plaintiffs also contend that alleged *ex parte* communications between plaintiffs and the arbitrator during the arbitration process are grounds for reversal of the award. Plaintiffs failed to disclose these alleged contacts, however, until after the award was entered, and have therefore waived any objection.

Finally, plaintiffs argue that the circuit court erred in failing to hold an evidentiary hearing on their complaint objecting to the arbitration award. As the appellate court noted, however, the circuit court was required, in considering defendants' motion to dismiss plaintiffs' complaint, to accept the allegations of the complaint as true. 311 Ill.

App. 3d at 595. Because the circuit court in making its ruling viewed the allegations of the complaint as true, there was no need to hold an evidentiary hearing to ascertain their truth.

The judgment of the appellate court is affirmed.

Affirmed.

CHIEF JUSTICE HARRISON, dissenting:

The answer to the question posed by the majority at the outset of its opinion is not yes. It is no. A party who decides against bringing an immediate appeal of an interlocutory order denying a stay of arbitration does not lose the opportunity to contest the arbitrability of the dispute in a subsequent appeal of the arbitration award.

Orders of the circuit court to compel or stay arbitration are injunctive in nature and subject to interlocutory appeal under Supreme Court Rule 307(a)(1) (166 Ill. 2d R. 307(a)(1)). *Notaro v. Nor-Evan Corp.*, 98 Ill. 2d 268, 271 (1983). Rule 307 confers on parties the right to appeal certain interlocutory orders before entry of final judgment. It does not, however, require them to take such appeals. Under the rule, parties have the option of waiting until after final judgment has been entered to seek review of the circuit court's interlocutory order. See *Anderson v. Financial Matters, Inc.*, 285 Ill. App. 3d 123, 135 (1996); *Alpine Bank v. Yancy*, 274 Ill. App. 3d 766, 768 (1995); *Davis v. Bughdadi*, 120 Ill. App. 3d 236, 241 (1983).

The optional nature of Rule 307 is manifest from the language it employs. Rule 307 plainly states that an appeal "may" be taken to the appellate court from any of the enumerated interlocutory orders. 166 Ill. 2d R. 307.

Use of the word "may" is generally regarded as indicating that action is permissive rather than mandatory. See *People v. Reed*, 177 Ill. 2d 389, 393 (1997). There is no basis for construing the term differently here.

The permissive language used by Rule 307 is shared by this Court's Rule 306 (166 Ill. 2d R. 306), which authorizes parties to petition for immediate appeal from certain other interlocutory orders. Among the orders subject to interlocutory appeal under Rule 306 are orders granting or denying motions for a transfer of venue. Where the circuit court orders transfer to another venue, a party may petition for immediate review under Rule 306. The failure to seek such review, however, does not preclude a party from challenging the circuit court's order later, after final judgment has been entered. See, *e.g.*, *American International Hospital v. Chicago Tribune Co.*, 120 Ill. App. 3d 435, 438-39 (1983).

The same is true under our court's Rule 308 (155 Ill. 2d R. 308), which authorizes parties to seek immediate review of an interlocutory order where the circuit court has made a written finding that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. As in the case of Rule 306, the failure of a party to exercise its option of seeking immediate review under Rule 308 is not fatal to the party's right to challenge the court's interlocutory order following entry of final judgment. To the contrary, "[a] request for an interlocutory appeal, under Rule 308, is entirely optional; nothing in Rule 308 or in case law suggests that failure to assert

one's rights under the rule amounts to waiver of the issue." *Prosen v. Chowaniec*, 271 Ill. App. 3d 65, 68 (1995).

An analogous situation is also presented by our Rule 604(f), which provides that a defendant "may" appeal to the appellate court from the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy. 145 Ill. 2d R. 604(f). That rule "does not mandate that a defendant file an interlocutory appeal; rather, by using the word 'may' it merely provides a defendant with the option of doing so." *People v. Franklin*, 159 Ill. App. 3d 56, 60 (1987). If a defendant elects not to exercise that option, he may still assert a double jeopardy claim on appeal from his conviction and sentence. *Franklin*, 159 Ill. App. 3d at 60.

Were we dealing here with statutes, there would be no question that the foregoing provisions, all of which pertain to interlocutory appeals, should be read consistently. As a general rule, statutes which relate to the same thing, subject, or object are deemed to be *in pari materia* and should be construed together. *People ex rel. Daley v. Datacom Systems Corp.*, 146 Ill. 2d 1, 17-18 (1991). Courts presume that statutes which relate to one subject were intended by the legislature to be consistent and harmonious with each other. *Collins v. Board of Trustees of the Firemen's Annuity & Benefit Fund*, 155 Ill. 2d 103, 111-12 (1993). Further, the same words used in different sections of a statute should be given a consistent meaning unless legislative intent to the contrary is clearly evident. See *Mirabella v. Retirement Board of the County Employees' Annuity & Benefit Fund*, 198 Ill. App. 3d 971, 974 (1990).

Although the present dispute involves rules of court rather than statutes, these principles apply with equal force. Our rules of court are construed in the same manner as statutes. *In re Estate of Rennick*, 181 Ill. 2d 395, 404 (1998); 134 Ill. 2d R. 2. That being so, I fail to see how Rule 307 can be given a mandatory construction when Rules 306, 308, and 604(f) are not.

If a party seeks to take an appeal under Rule 307, he must file a notice of appeal within 30 days (166 Ill. 2d R. 307), just as a party wishing to appeal under Rule 306 must file his petition within 30 days (166 Ill. 2d R. 306(b)), a party wishing to appeal under Rule 308 must make application within 14 days (155 Ill. 2d R. 308(b)), and a defendant wishing to appeal under Rule 604(f) must file a notice of appeal within 30 days (134 Ill. 2d R. 606(b)). If that deadline is not met, the party who is unhappy with the circuit court's order can still request that the circuit court reconsider its decision. That is so because a trial judge may review, modify, or vacate an interlocutory order at any time before final judgment, even if the original order was immediately appealable. See *Kemner v. Monsanto Co.*, 112 Ill. 2d 223, 240-42 (1986). The order at issue cannot be appealed to a higher court, however, until final judgment is entered in the case. The period for filing an interlocutory appeal is jurisdictional, and its expiration precludes appellate review during the pendency of the case. *Odom v. Bowman*, 159 Ill. App. 3d 568, 571 (1987).

Once final judgment has been entered, as it has been in the case before us today, all prior orders which were not final when entered become appealable. *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979). That is so even if such orders could have been the subject of an

interlocutory appeal but were not. The appellate court in this case was therefore wrong to hold that plaintiffs' failure to bring an interlocutory appeal under Rule 307 deprived the court jurisdiction to consider plaintiffs' contention that they should not have been compelled to arbitrate their dispute with defendants.

Decisions by the Second District (*Anderson v. Financial Matters, Inc.*, 285 Ill. App. 3d 123, 135 (1996); *Alpine Bank v. Yancy*, 274 Ill. App. 3d 766, 768 (1995)) and the Fifth District (*Davis v. Bughdadi*, 120 Ill. App. 3d 236, 241 (1983)) of the appellate court directly support this view. Both districts have correctly held that the failure to seek review of an interlocutory order under Rule 307 does not preclude a subsequent challenge to that order on appeal from the circuit court's final judgment. Although the First District has held otherwise (*Hwang v. Tyler*, 253 Ill. App. 3d 43, 45-46 (1993); *Safeway Insurance Co. v. American Arbitration Ass'n*, 247 Ill. App. 3d 355, 358 (1993)), its opinions are fatally flawed by the same analytical error made by the majority in this case. They focus exclusively on the technical requirements for perfecting an interlocutory appeal and completely overlook the earlier provisions in the rule governing whether a party is required to bring such an appeal in the first instance. Their analysis ignores the rule's permissive language and fails to interpret the rule's clear and unambiguous provisions in accordance with accepted rules of statutory construction. Accordingly, it is those decisions, rather than *Anderson v. Financial Matters, Inc.*, 285 Ill. App. 3d 123 (1996), and *Alpine Bank v. Yancy*, 274 Ill. App. 3d 766 (1995), that should be overruled.

For the foregoing reasons, I respectfully dissent.

JUSTICES FREEMAN and McMORROW join in this dissent.

JUSTICE FREEMAN, also dissenting:

I agree with Chief Justice Harrison that the language of Supreme Court Rule 307(a)(1) is permissive rather than mandatory. I also agree with Chief Justice Harrison that Rule 307(a)(1) must be construed *in pari materia* with Supreme Court Rules 306, 308 and 604(f). Therefore, I join his dissent.

I write separately to note that the majority opinion works an injustice upon plaintiffs. According to the majority, plaintiffs had to file an interlocutory appeal within 30 days of the order denying the stay of arbitration. Having failed to do so, plaintiffs cannot argue that the contract was not subject to arbitration. However, the chancery division of the circuit court (chancery court) did not resolve the issue of arbitrability in the order denying the stay. Rather the issue was left for the arbitrator to decide. Given these circumstances, plaintiffs should not be foreclosed from a review of their claim that the contract was not subject to arbitration.

The facts set forth in the majority opinion require elaboration. On March 9, 1994, plaintiffs, Neil Salsitz and Biago D'Ugo, each executed a letter of understanding, dated as of November 17, 1993, whereby Salsitz and D'Ugo agreed to invest $6,500 in defendant Alternative Utility Services of IL, Inc. (AUS). Defendant Fritz Kreiss executed the letters of understanding as president of AUS. The letters of understanding do not contain an arbitration clause. Also on March 9, 1994, Salsitz and D'Ugo each executed a document denominated:

> "Addendum 1, Letter of Understanding dated November 17, 1993
>
> INCENTIVE STOCK OPTION PROGRAM."

These documents contained an arbitration clause providing in part:

> "In the event there are any claims or disputes between PARTIES hereto, such claims or disputes shall be submitted by the PARTIES for resolution and binding arbitration within Lake County, IL, in accordance with the rules of the American Arbitration Association as in effect under IL law."

On June 17, 1994, Salsitz and D'Ugo requested the return of their investment. On July 21, 1994, Kreiss returned Salsitz's and D'Ugo's original investment. Salsitz and D'Ugo then filed suit in the municipal division of the circuit court (municipal court) for breach of contract and fraud, seeking $29,888.58 in unpaid expenses.

Kreiss and AUS moved to dismiss the municipal court action based upon the presence of the arbitration clauses in the addenda. Salsitz and D'Ugo filed a response denying that they agreed to arbitrate the claims at issue, arguing that there was no agreement to arbitrate since the arbitration clauses were in the addenda, not the letters of understanding. Salsitz and D'Ugo also argued that the contracts had been rescinded.

On February 15, 1995, the municipal court ordered the civil action stayed and directed that the arbitrator determine whether particular matters were arbitrable. Salsitz and D'Ugo did not pursue arbitration. However, Kreiss and AUS filed their own demand for arbitration on

November 16, 1995. In their demand for arbitration, Kreiss and AUS sought an injunction preventing Salsitz, D'Ugo and New Horizon Productions, Ltd., from unfairly competing with AUS, and they sought monetary damages for violation of the Illinois Trade Secrets Act, for tortious interference with defendants' existing contracts and with prospective business relations, for breach of contract, and for breach of fiduciary duty. On November 17, 1995, Salsitz and D'Ugo nonsuited the action in municipal court. At that point, all that remained before the court was Kreiss' and AUS's demand for arbitration.

Several arbitration hearings were held in 1996 and 1997. On August 8, 1997, Salsitz, D'Ugo and New Horizon Productions, Ltd. (collectively plaintiffs), filed a verified complaint in chancery court for declaratory and injunctive relief, seeking to stay and permanently enjoin the arbitration proceedings on the grounds that no agreement to arbitrate existed. Plaintiffs also sought a declaration that the arbitration clause was invalid or nonbinding. Plaintiffs also filed an emergency motion for a temporary restraining order, which was denied as not constituting an emergency. On August 19, 1997, the chancery court denied plaintiffs' request to stay the arbitration proceedings. As explained by the court at a later hearing:

> "This case first came to this Court during the pendency of an arbitration hearing. At that time, on or about August 19, 1997, then Counsel for Plaintiffs Salsitz, D'Ugo and the New Horizon Productions asked this Court to stay an arbitration proceeding commencing between the parties. The issue addressed during the emergency motion was a determination as to the arbitrability of the issues. Although this Court did not

> enter a stay of the arbitration Proceedings at that time, the Court did leave it open for parties to address the issue at a later date."

The arbitration continued. The parties were notified by the arbitrator that the final arbitration hearings would be held on December 10, 1997. Plaintiffs did not appear for those hearings. The arbitrator heard evidence from defendants regarding damages that they sustained. On December 11, 1997, the arbitrator declared the hearings closed, and issued a notice to plaintiffs on December 24, 1997. The notice informed plaintiffs that the arbitrator would issue an award within 30 days. Plaintiffs did not file a motion to reopen the hearings. On January 10, 1998, the arbitrator awarded defendants $3,761,174.40 in actual damages and $2.5 million in punitive damages.

On June 12, 1998, plaintiffs amended their complaint to add a count seeking to vacate the arbitration award. Plaintiffs alleged that the arbitration award was obtained through undue means, citing misleading communications between the arbitrator and plaintiffs. Plaintiffs also complained that the arbitrator should not have conducted the hearing on December 10, 1997, in plaintiffs' absence, and should not have closed the hearings without giving plaintiffs an opportunity to present evidence. Plaintiffs allege that they did not know the law firm, which had represented plaintiffs at the earlier hearings, had decided to cease representing plaintiffs and, consequently, did not appear on plaintiffs' behalf at the hearing on December 10.

Defendants filed an application for confirmation of the arbitrator's award and a motion to dismiss plaintiffs' amended verified complaint. At a hearing on January 29,

1999, the chancery court noted that the issue of arbitrability and defendants' motion to dismiss plaintiffs' amended complaint were intertwined. The court stated that it would first "address whether or not there could be arbitration of the agreement or agreements involved in the business relationship that was entered into by the parties." The court believed, however, that it could not upset or invalidate the arbitrator's ruling as to the arbitrability of the issues because the arbitrator's ruling was entitled to deference. The court reasoned:

> "[T]he Court finds that it cannot upset or invalidate the arbitrator's rulings as to the arbitrability of the issues * * * . The Court and the parties are both aware that – this is in parenthesis. Now I am quoting a case 'Judicial review of arbitration award is restricted. Courts encourage settlement of disputes by arbitration; and accordingly, judicial review of an arbitration award is more limited than Appellate review of a Circuit Court's decision. Courts must construe an arbitration award whenever possible to uphold their validity. Limited judicial review fosters the long accepted and encouraged principles that arbitration awards should be the end and not the beginning of litigation.' "

The court dismissed plaintiffs' amended verified complaint, affirmed the arbitrator's award of actual damages, and vacated the award of punitive damages.

Within 30 days after this final ruling, plaintiffs filed an appeal from the order dismissing their amended verified complaint. Defendants moved to dismiss the appeal as untimely under Rule 307(a)(1). Defendants argued, *inter alia*, that plaintiffs should have filed an interlocutory

appeal from the denial of plaintiffs' motion to stay the arbitration proceedings. Since plaintiffs failed to file an interlocutory appeal, they forfeited their right to contest the arbitrability of the contract. The appellate court granted the motion to dismiss as to the issue of arbitrability, but denied the motion as to the remaining issues. Having considered those issues on the merits, the appellate court affirmed the chancery court's order. 311 Ill. App. 3d 590. Plaintiffs then filed a petition for leave to appeal in this court.

According to the majority, plaintiffs had to file an interlocutory appeal from the order of August 19, 1997, in order to preserve the issue of arbitrability. It is clear, however, that the issue of arbitrability was not yet decided. When the chancery court denied plaintiffs' motion for a stay of arbitration, the court left the issue of arbitrability for the arbitrator to decide. It was on January 10, 1998, that the arbitrator issued its award, finding that the contract, and defendants' claims, were subject to arbitration. Since the issue of arbitrability had not been decided as of August 19 or even September 19, 1997, the cutoff date for an interlocutory appeal from the August 19 order, it is troublesome to require that plaintiffs have filed an interlocutory appeal by September 19 in order to preserve this issue. I believe that a timely objection to arbitrability of an issue preserves for review the question of whether the parties agreed to arbitrate the issue, even where the parties complete the arbitration. See *Bisluk v. Town Realty, Inc.*, 90 Ill. App. 3d 1039 (1980); *Ozdeger v. Altay*, 66 Ill. App. 3d 629 (1978); 710 ILCS 5/12(a)(5) (West 1996).

My reading of the facts of this case is in keeping with the chancery court's explanations of its actions. As noted above, as late as January 1999, the chancery court believed that the issue of arbitrability was subject to review. Indeed, the court ruled on the issue. However, because the chancery court believed that the arbitrator's ruling on arbitrability was subject to deference, the court determined not to upset the ruling.

The question in this case is whether plaintiffs waived the issue of arbitrability by failing to file an interlocutory appeal on September 19, 1997, even though the issue of arbitrability had not yet been decided. The majority answers yes. I respectfully dissent.

[SEAL]

SUPREME COURT OF ILLINOIS

[Names And Addresses Omitted In Printing]

December 3, 2001

Mr. Anthony E. Blumberg
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Chicago, IL 60602

No. 89156 – Neil Salsitz et al., etc., appellants, v. Fritz Kreiss et al., etc., appellees. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 13, 2001.

Opinion modified on denial of rehearing.

Chicago Tribune

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Wednesday, October 31, 2001

Metro

High court makes rare move; Illinois justices grant rehearings on 5 opinions

Christi Parsons, Tribune staff reporter

Although appellate judges are not supposed to rewrite legal decisions based on changes in their court's membership, the Illinois Supreme Court recently has rewritten four opinions issued only months before a virtually unprecedented overhaul of the court's personnel.

Justices also are reconsidering one other newly penned opinion, bringing to five the number of cases this year for which they have granted rehearings – a procedural move so rare that most attorneys usually consider it futile to even ask for one. Previously, the court had only granted rehearings four times in 14 years.

Such shifts in legal interpretation, seemingly based upon the court's personnel rather than a change in the legal landscape, are widely considered to be a destabilizing influence on the judiciary, the branch of government that is supposed to be sheltered from political winds.

Twenty years ago, when faced with the momentous decision of whether to uphold the state's death-penalty statute, a majority of the Illinois Supreme Court believed the statute was unconstitutional but nevertheless refused to throw it out.

That's because all three judges in the minority of a 4-3 decision handed down the year before refused to capitalize on a change in the court's makeup, which gave them a majority and the necessary votes to overturn the state's death penalty law. If the law changed with each turnover in the court, Justice Howard Ryan wrote, the idea that "ours is a government of law and not of men would be nothing more than pious cliche."

The Illinois Supreme Court already has undone four opinions handed down last year – three of them written by the controversial Republican Justice James Heiple.

The spate of rehearings "might be thought to undermine that sense of stability," said Bob Bennett, a constitutional law expert and former dean of the Northwestern Law School. "The law is supposed to be impersonal and stable, not a creature of who happened to win yesterday's election."

But recent elections and one appointment may have made all the difference in these cases, which include a death penalty case, a drug case and civil matters touching several areas of law. Three newly elected justices joined the court last December, and, in February, another newcomer was appointed to take the place of a retiring justice.

With the three newly elected justices on board in January, the court voted to rehear several cases. Justice Thomas Fitzgerald replaced a fellow Democrat and Justice Robert Thomas replaced a fellow Republican. But Democrat Thomas Kilbride, a former union worker, replaced the libertarian Republican Heiple – an ideological switch that could prove significant in the court's rulings in the years to come.

Then, after Justice Rita Garman was appointed to replace a fellow Republican in February, the court voted to take another case.

The new court rewrote the Heiple opinions earlier this year and, last week , they reversed themselves in a criminal case by ordering a new Circuit Court hearing to see if triple murderer Howard Wiley deserves the death penalty. "Clearly, the indications are the new people want to reconsider some things that were decided by their predecessors," said Ann Lousin, a professor of law at John Marshall Law School and an expert on the Illinois court. "I'd be reluctant to call it a liberal or conservative shift, because you just can't tell at this point. . . .

But they are obviously saying, 'We want to rethink these issues.' "

But past justices – and even current ones – have argued vehemently in the past against the rewrite of recent opinions.

In 1981, a new majority of justices who believed the death penalty to be unconstitutional nevertheless decided not to overturn it because, only a couple of years before, a majority of the court had upheld the statute. "Once this court has spoken," wrote Chief Justice Joseph Goldenhersh, "I, like any other citizen of Illinois, must acquiesce in its decision."

Justice Howard Ryan put a finer point on it, writing, "[T]he circumstances which warrant changes in the law do not include changes in personnel of the court."

Justice Charles Freeman, a current member of the court, echoed that sentiment in a death penalty dissent he

penned last year. In that discussion, Freeman was talking about cases that have already been all the way through the appeals process and resulted in final opinions. Technically, an opinion isn't final until the court has turned down the final petition for rehearing.

That is an important distinction to those who find no fault with the court's current action. The legal principle known as "stare decisis" – Latin for "to stand by that which is decided" – applies to final opinions, said one lawyer. "Stare decisis doesn't apply until the opinion is final," said Joel H. Greenburg, whose client benefited from the court's new opinion issued in an arbitration case last month. "And an opinion that's subject to petition for rehearing is not good law. This wasn't a situation where they threw stare decisis out the window."

But the other side in that case sees things differently. Anthony E. Blumberg's client had a $3.7 million award thrown out when the high court decided against him on a procedural question.

The earlier opinion had been published when the new court took over, Blumberg points out.

"I believe it was reheard because the minority in the original opinion sought an opportunity to change the ultimate outcome of the case," Blumberg said. In another rewrite of a Heiple opinion, the court reversed the drug conviction, which had been affirmed in the original opinion, of a Champaign County man and remanded it to the trial court. The third rewritten Heiple opinion modifies the court's earlier position in two obscure insurance cases.